IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6997

SANDRA LOCKETT,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MAX KRAVITZ
793 Pleasant Ridge
Bexley, Ohio 43209

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
PEGGY C. DAVIS
DAVID E. KENDALL
10 Columbus Circle
Suite 2030
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONER

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered December 30, 1976, rehearing denied January 28, 1977.

CITATIONS TO OPINIONS BELOW

The opinions of the Ohio Supreme Court are reported at 49 Ohio St.2d 48 (1976) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the prosecutor in summation made impermissible comments on petitioner's failure to testify and thereby violated her rights under the Fifth and Fourteenth Amendments.

2. Whether petitioner's sentence of death is constitutionally valid.

   a) Whether the Ohio death penalty statutes place unconstitutional limitations upon the consideration of mitigating circumstances.

   b) Whether death is a disproportionately severe and unconstitutional sentence for one who has not taken life, attempted to take life, or actually intended to take life.

   c) Whether the Ohio death penalty statutes violate the Sixth, Eighth and Fourteenth Amendments in that they deny the capitally accused the right to a judgment of his peers as to the existence of mitigating circumstances, and the appropriateness of the penalty of death.

   d) Whether Ohio capital sentencing procedures impermissibly penalize exercise of the rights to plead not guilty and to trial by jury.

   e) Whether Ohio capital sentencing procedures impermissibly shift to the defendant convicted of capital murder with specifications the burden of proving facts which distinguish those who may live from those who must die.

3. Whether petitioner's Sixth and Foureteenth Amendment rights were violated by the insufficiently examined exclusion for cause of prospective jurors with conscientious scruples against capital punishment.

4. Whether the Ohio Supreme Court, by giving retroactive application to a new construction of Ohio Revised Code Section 2923.03(A) governing complicity, denied petitioner's right to fair warning of a criminal prohibition and thereby deprived her of her life in violation of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

Ohio Rev. Code Ann. Sec. 2903.01 (Page 1975). Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Sec. 2923.03 (Page 1975). Complicity.

(A) No person acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense.

* * *

(F) Whoever violates this section is guilty of complicty in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section or in terms of the principal offense.

Ohio Rev. Code Ann. Sec. 2929.02 (Page 1975). Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

* * *

Ohio Rev. Code Ann. Sec. 2929.03 (Page 1975). Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section

2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Sec. 2929.04 (Page 1975). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt.

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president-elect of the United States, or the governor-elect or lieutenant-governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio Rule Crim. Pro. 11 (C)(4) (Page 1975). Pleas of guilty and no contest in felony cases.

> With respect to aggravated murder committed on and after January 1, 1974 the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.
>
> If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.
>
> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.
>
> If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

STATEMENT

On January 15, 1975, four people drove to downtown Akron and parked near a pawnshop. R. II 60-61. Two of them, Al Parker and Nathan Earl Dew, needed money to return to their home in New Jersey. R. II 90. The remaining two, petitioner and her older brother, were residents of Akron, R. 46, 116, who had met Parker and Dew on a visit to New Jersey. R. II 31, 41. Dew had with him a ring with a pawnable value of $100. R. II 19.

Petitioner's brother and Dew entered the pawnshop, R. II 61, and, as Dew was talking with the pawnbroker, Parker entered the shop. R. II 62. Parker asked to see a pistol, ibid; loaded it with bullets he had in his pocket, R. II 63; and proceeded to announce a stickup, whereupon the pawnbroker grabbed the gun, causing it to fire. R. II 63, 67, 73. Petitioner had not entered the shop.

The pawnbroker, Sidney Cohen, died of a single gunshot wound. R. II 15, State's Exhibit [illegible] Parker, Nathan Earl Dew, petitioner and her brother were indicted for having murdered him in the course of an aggravated robbery.[1/] Parker, by all accounts the person holding the murder weapon at the time Mr. Cohen was killed, was to have been the first tried. The day before his scheduled trial, Parker

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1/ State v. Parker, Summit Co. Court of Common Pleas, Case No. 75-1-97; State v. Dew, Summit Co. Court of Common Pleas, Case No. 75-1-99; State v. James Lockett, Summit Co. Court of Common Pleas, Case No. 75-1-98; State v. Sandra Lockett, Summit Co. Court of Common Pleas, Case No. 75-1-96.

pleaded guilty to the crime of aggravated murder without specifications (i.e., without the circumstances specified by Ohio Rev. Code Ann Sec. 2929.03 as predicates for the penalty of death). He had been told by his lawyers that "in return," R. II 87, he would be expected to testify against petitioner, her brother and Mr. Dew,[2/] R. II 88, and "to tell the truth," R. II 78, 87. The remaining three were convicted of aggravated murder with one or more specifications.[3/]

The conviction and death sentence of James Lockett was subsequently reversed by the Ohio Supreme Court because of the trial court's failure to permit defense counsel to use, for purposes of cross-examination and impeachment, a tape recorded statement made by Parker shortly after his arrest in

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2/ Parker did not testify against Nathan Dew. Dew made four statements to the police which were introduced at his trial. The first three were exculpatory as to James Lockett, Sandra Lockett and himself. State v. Dew, Summit Co. Court of Common Pleas, Case No. 75-1-99, R. 354-429. The fourth statement introduced at trial admitted a prior discussion of a pawnshop robbery with Al Parker outside the presence of James and Sandra Lockett. Dew related that at the time of the robbery, Sandra Lockett knew of Parker's plan and didn't want Parker to go through with it. When the car stopped near the pawnshop, Sandra Lockett told Dew not to go in but "I told her I was just going in and pawn the ring and get the hell out of there." State v. Dew, supra at R. 433. The night before the robbery, Sandra had objected to a robbery and told Parker that Dew was only going in to pawn the ring. State v. Dew, supra, at R. 435.

3/ Although Parker entered his plea before the trials of Nathan Dew, James Lockett and Sandra Lockett, he was not sentenced until April 10, 1975, after the convictions of his three co-defendants. State v. Parker, Summit Co. Court of Common Pleas, Case No. 75-1-97.

which Parker exonerated all of his co-defendants. This error was held prejudicial because "the state's case rested squarely on the shoulders and credibility of the co-defendant [Parker]..." State v. Lockett, 48 Ohio St.2d 71, 76 (1976).[4/] Nathan Earl Dew was convicted, but spared a sentence of death by a finding that his offense "was primarily the product of mental deficiency," one of the three mitigating circumstances recognized by Ohio Rev. Code Ann. Sec. 2929.04 (b)(3)[5/]

In the last of the trials involving the Cohen killing petitioner, too, was convicted of aggravated murder with specifications. She was sentenced to death by electrocution, R. II 218, 251, and is the only one of the four now under a sentence of death.

I. The Trial of Guilt or Innocence

Al Parker, who was 25 years old, R. II 24, had had five years of schooling in Sumter, South Carolina, id., had been convicted in New Jersey of burglary and possession of stolen property, R. II 30, 91, 92, had served time for the former charge, R. II 91, and was a fugitive on the latter charge. He provided the only evidence tending to show that petitioner

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4/ There was no attempt by petitioner's court-appointed trial attorneys to introduce this impeaching statement at her trial.

James Lockett's retrial ended in a hung jury. No third trial has been scheduled to date.

5/ The trial court found "beyond any doubt... that he was a borderline mentally retarded person.. [and] that the offense was primarily product of this mental deficiency," State v. Dew, Summit Co. Court of Common Pleas, Case No. 75-1-99, R. 256-57.

knew of or participated in plans to rob the pawnshop. He testified that the following conversation occurred on the day before the crime:

"Q Was the pawnshop ever discussed?

A The pawnshop, the first thing we was talking about pawning the ring.

Q Was it ever talked about robbing the pawnshop?

A Yes, sir.

Q What was said about robbing a pawnshop?

A Mr. James Lockett and Nathan Dew go in; I wait outside, then go in and get the gun to rob the pawnshop.

Q What did Sandra Lockett have to say about all this?

A She was to show us the pawnshop, but she had to stay in the car. That was her brother. She couldn't go in.

Q She knew the pawnshop operator, is that what you meant?

A Yes, sir.

Q Did you have any bullets on you at that particular point?

A Yes, sir.

Q Thursday night, Al, how was it determined who would go in and get the gun at the pawnshop?

A I was the one who had the bullets. Mr. James Lockett tell me what to do -- go in and ask the man let me see the gun, drop two bulletts in it.

Q What was Sandra supposed to do?

A. She was sitting out in the car.

Q What was James Lockett and Nathan Earl Dew supposed to do?

A. Mr. Dew and Mr. James Lockett supposed to go in and to get the man's attention like they are pawning a ring; and I was supposed to walk in behind them and ask him to let me see the gun; put the two bullets in it.

Q Now, did you ever ride by that particular pawn shop Tuesday night?

A Yes, sir.

Q Who was with you when you rode by?

A Me and Mr. Nathan Dew and Miss Sandra Lockett.

Q Was anything said by anybody when the three of you went by the pawnshop?

A Yes, sir.

Q What was that?

A Miss Sandra Lockett told us that's the pawnshop she's talking about."

R. II 56-57. He also testified that at about noon the following day, R. II 58, the co-defendants had another conversation:

> "Mr. James Lockett asked if we was still going to do it? Everybody said yeah. ...Me, Mr. Dew, Miss Sandra Lockett say yeah."

R. II 56. When they later drove "downtown" in Parker's car, with Parker driving and petitioner giving directions, R. II 59-60, they

> "...went by the pawnshop two or three times... when we get by, Miss Sandra Lockett said, that's the pawnshop."

R. II 60. Asked whether he had "any conversations with the defendant Sandra" before leaving the car to go to the pawnshop, he said

> "I told her, like two minutes after we was gone to switch the car, to crank the car up."

R. II 61.

The balance of Parker's testimony, and the remainder of the State's case against petitioner, concerned events following the shooting and unrelated and tangentially related events that preceded it.

Mr. Cohen sounded an alarm after the shot, R. II 64, and the three men fled, R. II 65. Parker took the pistol with him. He got in his car, which he said was running, and drove off with petitioner. R. II 66. Petitioner directed him to her aunt's home, and on the way he told her:

> "...I went in there, asked the man to let me see the gun; I put the two bullets in it and told him it was a holdup. I told him it was a holdup. He snatched the gun; the gun went off; he got hit."

R. II 67.[6/] Petitioner reportedly said nothing, but took the gun, which Parker had placed under the armrest, and put it in her pocketbook. Ibid. They stayed at the aunt's home "15 to 20 [minutes]; half hour at the most," and left in a taxi which petitioner had called. R. II 68. Parker sat on the passenger side; petitioner, behind the driver. R II 69. Petitioner gave directions to her home, R. II 69, which, according to the testimony of the cab driver, involved a longer route than he would have taken and, unlike the route he would have taken, avoided the pawnshop, R. II 132-33. Before they reached their destination, the taxi was stopped by a police cruiser, at which point petitioner moved closer to Parker and "whispered...that the gun was under the seat." R.II 69-70.[7/] The taxi driver testified that two officers

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6/ Al Parker also testified as to the unintentional nature of the shooting at R. II 63 and 73.

7/ The gun was subsequently found under the driver's seat of the cab. R. II 52.

had sat with Parker in the cruiser for a time, after which one of them returned to the taxi to tell petitioner that they were taking Parker in for questioning and that "the man [Parker] wanted her to go with him." R. II 130-31. At the station Parker said that he was from Chicago, and petitioner said that Parker was renting a room with her mother. R. II 72. Police officers made a call to the Lockett household, R. II 73, and released both suspects. R. II 72, 74. Petitioner and Parker returned to the Lockett household where they met petitioner's brother and Dew. R. II 73. Parker testified that at about ten o'clock that evening the police arrived, and petitioner hid him and Dew in the attic. R. II 76-77. Parker later returned to the home of Joanne Baxter, the woman with whom he had been staying in Akron. R. II 75. He was arrested there at about midnight. R. II 77.

Testimony regarding the events leading up to the robbery included a recitation of the activities of the co-defendants and Baxter over a four day period, during which they stayed out all night at bars, R. II 32; bailed petitioner's brother out of jail, R. II 41; were arrested for speeding, R. II 45; talked about committing two unrelated robberies, R. II 48-52; took petitioner to a Methadone Clinic, R. II 49; and purchased and smoked marijuana. R. II 53.[8/]

8/ Parker had met petitioner and Baxter in New Jersey where they were visiting petitioner's stepmother and step-sisters. R. II 109, 120. They were in a bar on a Friday evening, and they and five or six other people were out together until 6:30 the following morning. R. II 32. The next evening Parker, Baxter and petitioner went out together again. R. II 35. Petitioner and Dew, whom she had met at the home of a friend of Parker, separated from the party and Parker. Baxter and two of Parker's friends stayed at a

Petitioner refused on two occasions -- prior to commencement of her trial, and after the major portion of Al Parker's testimony -- to plead guilty to aggravated murder without specifications, and with the understanding that the aggravated robbery charge and an outstanding forgery charge would be dismissed. R. II 71-73, 78-79. She insisted, against the advice of counsel, that her brother and James Earl Dew be called as witnesses in her behalf. R. II 79-80, 147, 157. Both men, following the advice of counsel, refused to testify on the ground that their testimony might incriminate them. R. II 148, 158.[9/]

8/ [Continued]

"Club" until it closed at 1:45, and then spent the night at a hotel. R. II 36. On Sunday evening Parker did not see petitioner or Dew, but he and Baxter went out drinking. R. II 38. On Monday morning the group went to Jersey City to get petitioner's brother out of jail. His arrest was unexplained except for the following testimony:

> "Q Now, before you got James Lockett out of jail had you ever had any conversation with the defendant here...about jail?
>
> A She told me that, 'Al, they was locked up in Jersey City.'
>
> Q What are you referring to?
>
> A Her, Mr. Nathan Dew, Mr. James Lockett."

R. II 42. The group then drove to Akron, stopping to spend the night in a Pennsylvania Holiday Inn. R. II 43-44. Each of the two cars they were driving was stopped for speeding and assessed a fifty dollar fine. R. II 45-46. Both Parker and Baxter testified that on the Tuesday of their arrival in Arkon, R. II 46, petitioner discussed with Parker, Baxter and Dew the possibility of robbing two local businesses, R. II 48, 51, 111, and, after making a stop at a methadone clinic, R. II 50, 111, directed them to one of the proposed robbery targets, R. II 52, 112. Neither robbery was attempted or carried out. Baxter was dropped off to make a purchase of marijuana, after which she, petitioner, Parker and Dew returned to the Lockett household. R. II 53-54.

9/ At this time, both James Lockett and Nathan Dew were still awaiting mitigation hearings to determine whether they

Petitioner did not take the stand. Initially, one of her defense attorneys stated in the presence of the jury that she would testify. R. II 148. However, the court was subsequently informed outside the jury's presence that two apparent attempts by defense counsel to persuade petitioner to take the stand had been unsuccessful. R. II 150-51, 161. Petitioner remained silent, acting on the advice of her mother, who expressed, on the record, her dissatisfaction that two attorneys whom she had sought to retain to represent her daughter had not been permitted by court-appointed defense counsel to take charge of and handle the case. R. II 151-154.

During closing argument the prosecutor stated:

> What you heard with the State's witnesses, witnesses for the State of Ohio, is uncontradicted and unrefuted testimony by Al Parker, Joanne Baxter, Mrs. Garrett, Ronda Reed, the cab drivers involved. That's what you heard -- uncontradicted, unrefuted evidence from the witness stand. That's what you must decide the case on, ladies and gentlemen. R. II 186.
>
> * * *
>
> Aggravated robbery? Did the crime occur, ladies and gentlemen? No doubt. Uncontradicted, unrefuted that there was an aggravated robbery. No evidence to the contrary.
>
> Aggravated murder? Did that occur? Unrefuted, uncontradicted testimony and evidence that an aggravated murder occurred... R. II 187.
>
> * * *

9/ [Continued]

would be sentenced to death. State v. Dew, supra, mitigation hearing May 21, 1975; State v. James Lockett, supra, mitigation hearing May 2, 1975.

See n. 2, supra, regarding the exculpatory nature of the prior statements of Nathan Dew to the police.

> Let's talk about the evidence. The evidence uncontradicted and unrefuted that shows that this women, this heroin addict participated in the crimes of aggravated robbery and aggravated murder...R. II 188.
>
> * * *
>
> Is Al Parker believable? Every witness that came in here substantiated his story. Joanne Baxter, the cab drivers, Mrs. Garrett, Ronda Reed, everyone -- uncontradicted, unrefuted evidence.
>
> Nothing. No evidence from the Defense. Forget about their opening statement. They didn't prove a thing they said they were going to prove to you. R. II 192.

The jury was admonished not to "discuss or consider the question of punishment," R. II 195, and instructed that petitioner could be found to have killed purposely if she was found to have been involved in a conspiracy to rob by force:

> "A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. And if under the circumstances it may be reasonably expected that the victim's life would be in danger by the manner and means of performing the criminal act inspired, each one engaged in the common design is bound by the consequences naturally or probably arising in its furtherance....
>
> If the conspired robbery and the manner of its accomplishmet would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing. An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances."

R. II 201-02.

The jury deliberated for more than nine hours, R. II 214, 218, before finding petitioner guilty of aggravated murder, "committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense," and "committed while... committing or attempting to commit, or fleeing immediately after committing or attempting to commit... aggravated robbery," and guilty of aggravated robbery, R. II 218-20.

Trial counsel argued that a fair trial had been precluded by petitioner's lack of confidence in her attorneys and her domination by her mother, and moved for a new trial. R. II 227-237. The motion was denied, R. II 237.

II. Death Qualification of The Jury

On voir dire examination, the prosecutor had proceeded to death qualify the jury. He asked "...because there is a possibility of capital punishment we must ask this question and that is, does anyone here have an abiding conviction that is so strong against capital punishment that they could not sit, listen to the evidence, listen to the law, make their determination solely upon the evidence and the law without considering the fact that capital punishment is only a possibility in this case?"[10/] R. I 22. The trial court quickly took

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10/ Earlier, the prosecutor had stated that death was only a possibility because Judge Barbuto would make the final decision as to punishment. R. I 22. Thus, the jury was left free to believe that if it found petitioner guilty, she would receive mercy because her role was relatively minor. The jury was not informed that, under Ohio's death penalty statute, the "mitigating circumstances" that can save a convicted defendant's life are severely limited.

control of the voir dire examination, R. I 24,[11/] and, after a brief inquiry by the judge, four jurors were

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11/ "COURT: Let me pursue this since the doors been open, and I'm addressing myself to Jerry Smith, Minnie Lee, Betty Tomaselli, Barbara Barton, Dorothy Tiell, and Elizabeth -

MRS. BARTON: My name is Barbara Barton. I didn't say anything about capital punishment.

COURT: Alright. Dorothy Tiell. Those of you who have expressed a strong feeling in regard to capital punishment, the Court would like to ask you this. Those of you who have responded, do you feel that you could take an oath to well and truely try this case bcause you have to take an oath if you were selected as jurors in this particular case, could you take an oath and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment? Now, I will ask each and every one of you that. Jerry Smith, could you take the oath?

MR. SMITH: No.

COURT: You could not take an oath in this particular case because of your religious conviction?

MR. SMITH: (Nods head).

COURT: Your conviction?

MR. SMITH: I just don't believe in capital punishment.

COURT: Therefore you could not and would not take an oath, is that what you are telling the Court?

MR. SMITH: Right.

COURT: Minnie Lee?

MRS. LEE: Yes.

COURT: Could you take an oath in this case because of your convictions in relation to capital punishment?

MRS. LEE: I wouldn't like to because I don't believe in capital punishment.

11/ Continued]

COURT: Well my question is, would you and could you take an oath and would you follow your oath?

MRS. LEE: If I took it, I'd follow it but I wouldn't want to take it, not with capital punishment.

COURT: I still have to ask you directly, Minnie, would you take the oath, now that you know the situation?

MRS. LEE: No.

COURT: You would not take the oath?

MRS. LEE: No.

COURT: Alright. Betty Tomaselli?

MRS. TOMASELLI: I would not.

COURT: You would not take the oath?

MRS. TOMASELLI: No, I would not.

COURT: Dorothy Tiell, would you take the oath?

MRS. TIELL: Yes, I would take it.

COURT: Alright. Elizabeth Yakubik.

MRS. YAKUBIK: No, I would not.

COURT: You would not take the oath.

MRS. YAKUBIK: No.

COURT: Mr. Bayer, would you like to ask any questions? Have I covered every individual that has expressed themselves in relation to capital punishment, who are opposed to capital punishment? I have addressed myself to each and every one of you? Mr. Bayer, would you make further inquiry of these prospective jurors?

MR. BAYER: No, I don't think so, your Honor. You mean the five that would not or could not take the oath?

COURT: Yes.

MR. BAYER: No, I have no questions.

MR. RUDGERS: He has no objections to excusing them?

MR. BAYER: I have no objections.

11/ [Continued]

MR. RUDGERS: State would move to excuse those jurors who just were examined and who have said they would not take the oath.

COURT: Yes. The Court will excuse Jerry Smith, Minnie Lee, Betty Tomaselli, Elizabeth Yakubik. The reason why you are being excused, you must take an oath or affirm in a criminal case, in a case to well and truely try the case. Let me ask you this. I didn't use the word affirm. Would any of you affirm to well and truely try this case? Jerry?

MR. SMITH: No.

COURT: You would not?

MR. SMITH: (Shakes head).

COURT: Minnie?

MRS. LEE: No.

COURT: She would not. Betty Tomaselli?

MRS. TOMASELLI: No.

COURT: She would not. Elizabeth?

MRS. YAKUBIK: No.

COURT: She would not.

MR. RUDGERS: The State would renew it's [sic] motion.

COURT: Alright. Thank you. I want to thank each and every one of you for being very honest with the Court and with the parties to this action because you must take an oath or affirm, either one. Since you feel that you cannot and will not, and I am expressing myself, that you feel you will not take the oath knowing the possibility here the Court will excuse you for cause. Would you kindly report back to the Jury Commissioner, please? She will excuse you from there. There's some formalities you have to comply with. Thank you very much." R. I 24-28.

excused without questioning or objection by defense counsel.[12/]

III. The Penalty Phase

After denying petitioner's motion for a new trial, R. II 237, the trial judge conducted the penalty proceeding provided by Ohio Rev. Code Ann. Sec. 2929.03(C) - (E).

No testimony was offered during this proceeding. The judgment of the court was based upon four written professional reports -- two by psychiatrists and two by psychologists --, a pre-sentence report, reports from the Akron Drug Abuse Clinic, and arguments of counsel. All of the documents, with the exception of the Clinic reports, were State's Exhibits, and were admitted upon stipulation.[13/] R. II 224-25, 238.

12/ At the time of this death qualification, only one of the two appointed attorneys for Sandra Lockett was present in the courtroom. He did not question or object to the dismissal of jurors who had scruples against capital punishment. The defense attorney who conducted most of the voir dire examination entered later, R. I 32; apparently he had been in another courtroom on another case. R. I 96. He made a belated objection to the dismissal of the death-scrupled jurors but did not request the opportunity to re-examine them. R. I 73-4. He did not inquire of any other jurors as to their scruples for or against capital punishment during his examination.

13/ Apparently, defense counsel did not consult with petitioner or review the reports with her prior to the mitigation hearing. The court inquired of the defendant:

> "COURT: Before we get to the motion for a new trial, Sandra Lockett, have you consulted with your Attorneys in relation to these reports that we have just been discussing?

The psychiatric experts had been instructed by the trial court that "[t]he one question to be considered in this case at this point is whether or not the Defendant has a mental deficiency." Both psychiatric reports concluded that petitioner suffered no psychosis or mental deficiency. Neither of these brief reports contained anything negative about petitioner's life or character.

13/ [Continued]

DEFENDANT: No.

COURT: You have not?

DEFENDANT: No.

COURT: Do you concur with their position in regard to stipulating these documents?

DEFENDANT: Uh huh.

COURT: I can't hear you?

DEFENDANT: Yes.

COURT: You do? In other words, what the Court wants to say to you before you answer. The Court says to you that you have the right to have these people that we are talking about, Dr. Villalba, Dr. Gunter, Dr. Hungerman, Daniel Reinhold, and Mrs. Denton appear personally and testify. You have the right to cross examine them in regard to their testimony, if you so desire; or as suggested here by the Proscutor and your Attorneys, that you will stipulate, you will agree that this is what they would testify to and there's no need for cross examination. Is that what you are saying?

DEFENDANT: Yes.

COURT: Do you understand what the Court has said?

DEFENDANT: Yes.

COURT: Is there any question that you want to ask the Court in regard to this?

DEFENDANT: No.

COURT: Okay. The Court will accept it."

R. I 225-26.

The psychological reports were more comprehensive. The first concluded that petitioner:

> "...gave no indications of being a seriously disturbed individual or even one who could be described as an inadequate personality. She does employ the defense of denial, and much of her response seem to have a pollyanna effect."

The second reported that she was of low-average intelligence, and summarized her personality as follows:

> "The results portray Sandra as friendly, well socialized, optimistic, sensitive, honest, sincere, good humored, rational, good emotional affect, and honestly aware of herself.
>
> The only measured flaws were the negative feelings [against her brother and Al Parker], a carelessly optimistic outlook, a tendency to be simpleminded as opposed to insightful, and a lack of inclination to accurately assess the negative implications of a negative situation -- in her mind things always turn out good."

The report concluded with the following evaluation:

> "It may easily be hypothesized that if Sandra were from a different socio-economic background, she would never have had difficulty with the law.
>
> In her own words her problems may exist to a large degree because 'I'm just too nice.'
>
> The dominant theme in her personality seems to be a need to nurture others. She wants to be kind, happy, loving, and supportive. She doesn't want disagreement, discord, anger, hurt, or unnecessary pain in her relationships with others. Her defense mechanisms seem to turn difficulties into hopeful optimism, failure into acceptance, destructive hurt into denial, and disaster into disassociation from pain accompanied by a rationalized optimism. The 'Pollyanna' outlook might summarize this dynamic.

Her intelligence is adequate to deal with this society. However, it may be hypothesized that her need to avoid pain has resulted in a handicap. She is deficient in her ability to generalize concepts, and to perceptually organize visual material. That suggests that there is a possibility of orgainc [sic] deficiency. It also suggests that Sandra would probably not be aware of the predicted ramifications and consequences of some verbally presented concepts. She tends to deal best with simple, familiar ideas.

Unfortunately, considering her situation, this condition is probably not a mental deficiency. Rather, it is a handicap which may hinder her functioning in some situations until she can compensate for the handicap.

Also, the evaluation doesn't support the presence of a deficiency based on emotional or personality factors.

In her favor, it should be noted that Sandra's contention that she did not participate in a plan to murder anyone is very supportable. Her personality structure not only is unlikely to result in unnecessary anger or violence, but is in fact oriented against acting out or hurting. It is very easy to picture her discouraging any wrong doing which would hurt anyone, especially someone she cares about. It is easy to believe, for example, that she would not want her friends to rob a store.

Finally, if she is to be returned to society, her prognosis for rehabilitation is very favorable. At present there is no special program which would seem to be needed."

The pre-sentence report, prepared by a probation officer, offered an "imprssion" in agreement with one of the psychiatrists that petitioner was not suffering from a psychosis, mental defect or mental deficiency.

The Drug Clinic reports included the following summary by petitioner's counselor:

> "Sandra was admitted to this clinic on May 29, 1974 at which time she was gainfully employed by Chrysler Corporation in Twinsburg. During her stay in this clinic I met with Sandra on the average of two to three times a week serving as her counselor. Our counseling sessions were focused mainly on her personal prolbems, and she seemed to be very sincere about becoming drug free, and getting ahead in life. I didn't have trouble with her keeping our counseling appointments, and her overall attitude and general conduct in, and about the clinic were good.
>
> In my opinion and observations Sandra was on the road to success as far as her drug problem was concerned."

Defense counsel noted petitioner's marijuana and methadone use and urged that petitioner's offense was the product of a mental deficiency:

> "Now I am very jealous of my reputation. I do not believe in the seizing upon all of the technicalities which have unfortunately in my opinion grown up in our present body of law concerning the protection of people accused of crime. But I do believe that when the legislature itself, probably when they passed the law having in their mind, their collective mind, some reservation about the morality of capital punishment, provided an out that that provision should be liberally interpreted for the benefit of the accused."

R. II 247. Although the State had presented in its closing to the jury the argument -- foreign to the record -- that the motive for petitioner's crime was her "admitted" heroin addiction, R. II 190, the prosecutor responded:

> "I would agree that she probably has been on Methadone. There's no question about that. No question she might have been on heroin at one time or

another. I don't think there's any way of knowing even from those reports whether she had any drugs -- we have to assume she didn't -- I am saying extra drugs the day this happened."

R. 250.

The findings and judgment of the trial court were as follows:

> "The Court finds that the evidence is overwhelming in that there was no mental deficiency or no psychosis -- this was not the primary product of psychosis or mental deficiency as required by the law. Therefore, the Court has no alternative, whether the Court likes the law or not, the Court has to enforce the law as he sees it and he interprets it, and the Court will do so....
>
> Therefore, it's the order of this Court conforming to the verdict of the jury, that you be taken to the Summit County Jail, and there safely kept and within 30 days to be conveyed by the Sheriff of Summit County to the proper institution, and within the walls therein and within a certain enclosure prepared for this purpose, and under the direction of the Warden you shall be put to death on September 5, 1975, having a current of electricity of sufficient intensity to cause the death to pass through your body..."

R. II 251-52.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In her brief to the Ohio Supreme Court, petitioner alleged that her Fifth and Fourteenth Amendment privilege against self-incrimination was violated by the prosecutor's improper comments to the jury on her failure to testify. Brief of Defendant-Appellant, Ohio Supreme Court, pp. 70-73. The Ohio Supreme Court held the statements in issue did not constitute a comment by the prosecutor upon the failure of the defendant to testify. State v. Sandra Lockett, 49 Ohio St. 2d 48, 65 (1976).

Petitioner's Eighth Amendment claims were overruled on the merits. State v. Sandra Lockett, supra, 48 Ohio St. 2d at 63.

Petitioner's Sixth Amendment arguments involving the applicability of Witherspoon v. Illinois, 391 U.S. 510 (1968) were also rejected on the merits. State v. Sandra Lockett, supra, 48 Ohio St. 2d at 55-57.

Petitioner's Due Process claim involving denial of the right of fair warning of a criminal prohibition results from the Ohio Supreme Court's unforeseeable interpretation in this case of Ohio's new complicity statute, Ohio Rev. Code §2923.03(A)(2) (Page 1975). In the opinions below the scope of criminal culpability required by the statute was vigorously contested, the dissent maintaining that the majority had ignored the "clear meaning" of the statute. State v. Lockett, supra, 48 Ohio St. 2d at 67-71.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PROSECUTOR IN SUMMATION MADE IMPERMISSIBLE COMMENTS ON PETITIONER'S FAILURE TO TESTIFY AND THEREBY VIOLATED HER RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

In this case petitioner chose not to take the stand. In his summation, the prosecutor stated no less than six times in rapid succession that the evidence was "uncontradicted" and "unrefuted," R. II 186, 187, 188, 192, and then added:

> "Nothing. No evidence from the Defense." R. II 192.

The prosecutor's statement was an obvious reference to petitioner's reliance upon her constitutional right not to testify. Perhaps the oft-repeated description of the prosecutor's evidence as "uncontradicted" and "unrefuted" might have been understood by the jury, and thus excused by this Court, as a comment directed to the defendant's failure to produce other witnesses than herself. We frankly doubt that this distinction is comprehensible to a lay jury; it rather smacks too much of Pound's definition of the legal mind as capable of thinking about one of two inseparable things without thinking about the other. But we may pass over that question because, if the prosecutor meant only to say that the defendant had called no third-party witnesses, he surely had made that point aplenty with his six "unrefuteds" and "uncontradicteds." The addition of the comment, "No evidence from the Defense" can hardly have been taken by the jury to refer to anything other than the defendant's failure to testify.

The jurors were acutely aware that petitioner had elected not to take the stand, since defense counsel had at one point mistakenly stated in their presence that she would testify, R. II 148, but she later failed to do so. That occurrence was unfortunate, but the prosecutor's playing on it was inexcusable.

This Court has very plainly held that prosecutorial reference to a defendant's failure to testify violates the Fifth and Fourteenth Amendments. Griffin v. California, 380 U.S. 609 (1965); O'Connor v. Ohio, 385 U.S. 92 (1966); cf. Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). No prosecutor could misunderstand that prohibition. Whether the prosecutor here could evade it by the verbal hairsplitting of saying that there was no evidence "from the defense" instead of "from the defendant" is a question that this Court should review if the rule of Griffin is not to be mocked and manipulated into meaninglessness. Prosecutorial comment of this sort, so obviously fraught with danger of being understood in its forbidden sense, and so completely unnecessary unless the prosecutor intended precisely that understanding, should not be tolerated by this Court.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONAL VALIDITY OF PETITIONER'S SENTENCE OF DEATH.

INTRODUCTION

This case, involving a woman innocent of committing, attempting or actually intending any violent assault, raises issues of far-reaching significance concerning both the range of circumstances under which the death penalty is constitutionally tolerable, and the procedure by which that most awesome of penalties may be meted out.

In reviewing the death penalty provisions of Florida, Georgia, North Carolina and Louisiana, this Court determined that informed, focused capital sentencing deliberations, subject to reevaluation by a State's highest court, serve to minimize the risk of arbitrary or inappropriate use of the penalty; but that mandatory capital sentencing systems impermissibly preclude particularized consideration of the appropriateness of a sentence of death, and invite arbitrariness. In upholding the death penalty provisions of the State of Texas, this Court determined that a reviewable inquiry concerning the future dangerousness of a capitally convicted defendant properly encompasses sufficient analysis of "particularized mitigating factors," such as youth and lack of a serious prior criminal record, Jurek v. Texas, 428 U.S. 262, 272-73 (1976) (plurality opinion), to prevent arbitrary or inappropriately severe death sentences.

The Ohio statute under which petitioner stands condemned is distinctive in that it provides a sentencing proceeding --

thereby avoiding the appearance of mandatoriness -- but narrows the scope of sentencing deliberations so drastically as to preclude an "individualized sentencing determination." Jurek v. Texas, supra, 428 U.S. at 271. Moreover, the Ohio death sentencing procedure lacks the ameliorating influence of jury participation and therefore stands isolated from the conscience of the community; it penalizes exercise of the rights to plead not guilty and to have a jury trial even as to the question of guilt or innocence; and it shifts to the capitally convicted defendant the burden of establishing those facts which separate the condemned from those who will be spared.

A.

The Ohio Death Penalty Statutes Place Unconstitutional Limitations Upon the Consideration of Mitigating Circumstances.

Woodson v. North Carolina, 428 U.S. 280 (1976), and Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976), hold that contemporary standards of decency require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, supra, 428 U.S. at 303 (plurality opinion). The Court recognized that:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

Id. at 304. Again, in Harry Roberts v. Louisiana, ____, ____ U.S. ____, 45 LW 4584 (June 6, 1977), the Court stressed that "it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant either to the particular offender or the particular offense." Id. at 4585 (emphasis added). Moreover, the Court acknowledged in Woodson that the several legislative enactments allowing rigid application of the death penalty in the wake of Furman v. Georgia, 408 U.S. 238 (1972), represented not renewed societal acceptance of undiscriminating infliction of capital punishment, but rather attempts by the States to conform to what were incorrectly thought to be the requirements of Furman. Woodson v. North Carolina, supra, 428 U.S. at 298-99 (plurality opinion).

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in Woodson and the two Roberts decisions, are more rigid than contemporary standards of decency can condone. They reflect not societal acceptance of such rigidity, but rather an effort by the Ohio Legislature to meet criteria that were wrongly supposed to be mandated by Furman.

In the wake of Furman, 20 of the 35 States that enacted new death sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of

certain criminal conduct.[14] These States responded to the judgment of respected legal scholars that only the removal of all sentencing discretion would satisfy the Furman requirement that death sentences not be arbitrarily imposed. However, the Federal Government and 11 States enacted statutes following the example of the Model Penal Code and directing consideration of aggravating and mitigating circumstances in the process of determining sentence in a capital case.[15] These twelve jurisdictions, finding the mandatory scheme too harsh and anticipating that this Court would approve capital sentencing discretion if that discretion were were guided by standards, chose to focus sentencing deliberations upon a broad range of mitigating factors.[16]

14/ Cal. Penal Code §190-190.03 (1977 com. pocket part); Del.Code Ann., tit. 11, §4209(a)(1976 cum. supp.)(subsequently repealed); Idaho Code §18-4004 (1976 cum. pocket part); Burns' Ind. Stat. Ann. §35-13-4-1 [10-3401](b)(1975)(subsequently repealed); Baldwin's Ky. Rev. Stat., Ky. Penal Code §§507.020, 532.010, 532.030 (May 1976 unit) (subsequently amended); La. Rev. Stat. Ann. §14.30 (1977 cum. pocket part); Miss. Code Ann. 1972, §§97-3-19, 97-3-21 (1976 cum. supp.)(subsequently amended); Vernon's Mo. Stat. Ann. §§559.005,559.009(3) (1976 cum. pocket part) (subsequently repealed); Nev. Rev. Stat. §200-030(1), (5)(1975); N.H. Rev. Stat. Ann. 1974, §630.1 (1974); N.M. Stat. Ann. 1953, §40A-2-1 (2d Repl. vol. 1972), 40A-29-2 (1975 supp.); N.Y. Penal Law §§60.06, 125.27 (1976 cum. supp.); N.C. Gen. Stat. §14-17 (1975 cum. supp.)(subsequently amended); 21 Okla. Stat. Ann. §§701.1, 701.3 (1975-1976 cum. pocket part)(subsequently repealed); R.I. Gen. Laws 1956, §11-23-2)(1976. supp.); S.C. Code §§16-3-20, 16-52 (1976)(subsequently amended); Tenn. Code Ann. §§39-2402, 39-2405 (Repl. vol. 1975)(subsequently amended); Va. Code 1950, §§18.2.10(a) (Repl. vol. 1975), 18.2-31 (1976 supp.)(subsequently amended); Wash. Rev. Code Ann. §§9A.32.045, 9A.32.046 (1977 Special pamphlet)(subsequently amended); Wyo. Stat. Ann. §6-54(b)(1975 cum. supp.)(subsequently repealed).

15/ See AMERICAN LAW INSTITUTE, MODEL PENAL CODE §201.6 (P.O.D. 1962).

16/ In Arizona, Georgia, Illinois, Montana and Utah, any factor deemed mitigating by the sentencing authority

16/ [Continued]

could be considered, and could preclude imposition of a capital sentence. Ariz. Rev. Stat. §13-454(D) ((1973 supp. pamphlet); Ga. Code Ann.§27-2534.1(b) (1974 cum. pocket part); Smith-Hurd Ill.Ann. Stat.c.38, §1005-8-1A (1977 cum. pocket part); Mont. Rev. Codes Ann. §94-5-105(1) (1974 interim supp. part3); Utah Code Ann. §76-5-202(1)(g) (1975 cum. supp.). And the mitigating factors considered in the sentencing process in these twelve jurisdictions invariably include factors having to do with the character and record of the defendant whose life is at stake. Thus, in Alabama, Arkansas, Colorado, Connecticut, Florida, Nebraska, Utah and in Federal jurisdictions, the age of the defendant must be considered, and in Colorado and Connecticut and under Federal law a finding that the defendant was under eighteen is an absolute bar to imposition of a death sentence. Code of Ala. Recompiled, tit. 15, §342(9)(g) (1975 interim supp.); Ark. Code §41-1403(4) (1975 special supp.); Colo. Rev. Stat. 1973, §16-11-103(5)(a) (1976 cum supp.); Conn. Gen. Stat. Ann.§53a-46a (f)(1) (1976 cum. pocket part); Fla. Stat Ann. §921.141(6)(g) (1976 cum. pocket part); Nebr. Rev. Stat. §29-2523(2)(d) (1975); Utah Code Ann. §76-3-207(1)(e) (1975 cum. supp.); 49 U.S.C..A §1473(c)(6) (1976). See also Cal. Penal Code §190.3 (1977 cum. pocket part); N.M. Stat. Ann. §40A-20-2 (1975 supp.); N.Y Penal Law §125.27 (1976 cum. supp.). In all twelve jurisdictions, the prior criminal record of the defendant must be considered. Code of Ala. Recompiled, tit. 15 §§342(8)(a) and (b), 342 (9)(a) (1975 interim supp.); Ariz. Rev. Stat §13-454(E) (1) and (2) (1973 supp. pamphlet); Ark. Code §§41-1303(1) and (2), 41-1304(6) (1975 special supp.); Colo.Rev. Stat. 1973, §16-11-103(6)(a) and (b) (1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-46a(g) (1) and (2) (1976 cum. pocket part); Fla. Stat. Ann. §921.141(5)(a) and (b) and (6)(a) (1976 cum. pocket part); Ga. Code Ann. §27-2534.1(b)(1) (1974 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c. 38, §1005-9-1A(3) (1977 cum. pocket part); Mont. Rev. Code §94-5-105(a) and (b) (1973 special pamphlet); Nebr. Rev. Stat. §29-2523(1)(a) and (2)(a) (1975); Utah Code Ann. §§76-3-207(a), 76-5-202(a) and (g) (1975 pocket supp.); 49 U.S.C.A. §1473(c)(7)(B)(i) and (ii) (1976). In Alabama, Arizona, Arkansas, Florida and Nebraska, a broad range of mental and emotional disturbance may be considered mitigating. Code of Ala. Recompiled, tit. 15 §342(9)(b) (1975 interim supp.); Ark. Code §41-1304(1) (1975 special supp.); Fla. Stat. Ann. §921.141(6)(b) (1976 com. pocket part); Nebr. Rev. Stat.§29-2523(2)(c) (1975). And limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating in Alabama, Arizona, Arkansas, Connecticut, Florida and Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado. Code of Ala. Recompiled, tit. 15 §342(9)(f) (1975 interim supp.); Ariz. Rev. Stat. §13-454(F)(1) (1973 supp. pamphlet); Ark.Code §41-1304(3) (1975 special supp.); Colo. Rev. Stat. 1973,§16-11-103(5)(b) (1976 cum. supp.); Conn. Gen. Stat. §53a-46a(f)(2) (1976 cum. pocket part); Fla. Stat. Ann. §921.141(6)(f) (1976 cum. pocket part); Nebr. Rev. Stat. §29-2523(2)(g) (1975); 49 U.S.C..A. §1473(c)(6)(B) (1976).

At the time of the Furman decision, a statute containing mitigating circumstances of the kind contained in the Model Penal Code had passed the Ohio House of Representatives and was pending before the Senate Judiciary Committee.[17/] In light of Furman the Senate Committee felt it necessary, in the words of two primary sponsors of the bill, to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and the jury as much discretion as possible in the punishment determination procedure."[18/] Sentencing determinations in capital cases were therefore taken from the jury and all mitigating factors having to do with the character and background of the offender were eliminated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency..."

Ohio Rev. Code §2929.04(B)(3).[19/]

17/ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV. ST. L. REV. 8, 18 (1974).

18/ Id. at 20.

19/ The statute provides that the trial judge or, if trial is without a jury, a panel of judges, Ohio Rev. Code §2929.03 (C), must impose a death penalty unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of the evidence:

> "(1) The victim of the offense included or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Ohio Rev. Code §2929.04(B).

In view of the extreme improbability that a psychotic offender would be found criminally responsible, the utility of this circumstance as a means of allowing consideration of the life and character of the accused turns, in practice, upon the scope of the term "mental deficiency." This term is, as a matter of general and psychiatric usage, synonomous with mental retardation, and the Supreme Court of Ohio has held that its meaning is not significantly broader in the context of §2929.04. State v. Bayless, 48 Ohio St. 2d 73 (1976)[20] Thus -- under a sentencing scheme designed "to remove ... as much discretion as possible in the punishment determination procedure"[21] -- every person who is neither psychotic nor mentally retarded and who is convicted of a capital crime becomes part of "a faceless, undifferentiated mass to be sub-

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20/ That Court noted:

> "[m]ental deficiency is consistently defined to mean a low or defective state of intelligence."

Id. at 96, and deemed itself:

> "... unable to find that the decision of the General Assembly to allow mitigation of sentence for those who are mentally deficient, but not of other mental disorders not constituting psychosis or amounting to insanity, falls outside the proper scope of its authority to assign responsibility and punishment for criminal offenses."

Id. at 87. In State v. Royster, 48 Ohio St. 2d 381 (1976), the court upheld, against a claim that the evidence required a finding of mental deficiency, a death sentence imposed upon a defendant who "had an I.Q. of 75 in 1962; 61 in 1966; and 54 in 1968," id. at 389.

21/ See note 18, supra.

jected to the blind infliction of the penalty of death"[22] without independent consideration of mitigating aspects of his life and character.

Furthermore, the Ohio legislation precludes consideration of most mitigating circumstances inherent in the crime itself, permitting mercy only in the rare case in which duress or victim inducement is present but does not constitute a defense.[23]

This Court's recognition that, under contemporary standards of morality, not "'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender,'" and that "'individual culpability is not always measured by the category of crime committed'"[24] is confirmed by the record of capital legislation enacted since July of 1976. For legislatures free of misconceptions engendered by the Furman opinions have commonly allowed consideration of any circumstance deemed mitigating by the sentencer,[25] and have in no case defined

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22/ Woodson v. North Carolina, supra, 428 U.S. at 304 (plurality opinion).

23/ See note 19, supra.

24/ Stanislaus Roberts v. Louisiana, supra, 428 U.S. at 333 (plurality opinion).

25/ Ark. Code §41-1301(4)(9175 special supp.); Del. Code §4209(c) (1977 amendment); Ga. Code Ann. §27-2534.1(b) (1974 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c.38 §1005-8-1A (1977 cum. pocket part); Burns Ind. Stat. Ann. §35-50-2-9(c)(7) (1977 amendment); Miss. Code of 1972 §97-3-21(2) (1977 amendment); Mont. Rev. Code Ann.§94-5-105(1)(1974 interim supp.)(unless victim was a peace officer killed while performing his duty); N.C. Gen. Stat. §15A-2000(f)(9) (1977 amendment); Okla. Stat. Ann. §701.10 (1976 cum. pocket part); Utah Code Ann. §76-3-207(g) (1975 cum. supp.); Va. Code Ann. §19.2-264.3(B) (1977 amendment); Wash. Rev. Code Ann. §9A.32.045(2) 1977 amendment).

mitigating factors as restrictively as did the Ohio legislature.[26/]

Petitioner's case amply demonstrates the rigidity and the inhumanly narrow circumscription of mitigating considerations in the Ohio sentencing scheme. For she was condemned, not in spite of, but without consideration of:

- her youth;
- the unrefuted evidence of her generally good character;
- the fact that she had never before been convicted of a violent crime (unless one counts the crime of resisting an officer, for which she was fined $25);
- her excellent prospects for rehabilitation;
- the fact that she did not kill;
- the fact that her participation in the crime was relatively minor; or
- the fact that the killing itself was not intentional.

26/ The states specifically defining mitigating factors are Code of Ala. Recompiled, tit. 15, § 342(9) (1975 interim supp.); Ariz. Rev. Code Stat. §13-454(F) (1973 supp. pamphlet); Ark. Code §41-1304 (1975 special supp.); Colo. Rev. Stat. 1973,§16-11-103(5) (1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-462(f), (1976 cum. pocket part); Fla Stat. Ann. §921.141(6) (1976 cum. pocket part); Baldwin's Ky. Rev. Stat. §532.025 §2(2)(b) (1977 temporary issue); Vernon's Mo. Stat. Ann. §559.009.5.3 (1977 amendment); Nebr. Stat. §29-2523(2) (1975); S.C. Code §16-52 (1977 amendment); Tenn. Code Ann. §39-2406 (1976 revision); Wyo. Stat. §§6-54.1, 6-54.2, 6-54.3 (1977 revision); also Federal jurisdictions, 49 U.S.C..A §§1473(6) (1976). A typical list of mitigating circumstances is that of Nebraska, which includes (a) defendant's criminal record, (b) unusual pressures or influences or the domination of another person, (c) extreme mental or emotional disturbance, (d) defendant's age, (e) the fact that defendant was an accomplice in the crime whose participation was relatively minor, (f) the fact that the victim was a participant in the defendant's conduct or consented to the act, (g) impairment of defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law as a result of mental illness, mental defect, or intoxication. Nebr. Rev. Stat. §29-2523(2) (1975).

This result was possible because, unlike the Texas statute which this Court sustained only through a liberal and non-literal construction of its terms in Jurek (428 U.S. at 272-73), the Ohio statute fails to provide a sentencing question which is both open-ended and invariably applicable (let alone an unlimited roster or a broad-ranging list of mitigating factors as in Georgia or in Florida).[27/] Any defendant, for any number of reasons, may or may not be a future threat to society, see Jurek v. State, 522 S.W. 2d 934, 939-940 (Tex. Cr. App. 1975); Jurek v. Texas, supra, 428 U.S. at 272-74 (plurality opinion); but even the most mercy-deserving of capital defendants may happen not to have acted under duress or victim inducement or to have been psychotic or retarded.

A system which requires the condemnation of a woman like petitioner, and furthermore provides no appellate protection against her execution,[28/] cries for evaluation by this Court in light of the "fundamental respect for humanity underlying the Eighth Amendment ... [that] requires consideration of the character and record of the individual

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27/ See Gregg v. Goergia, 428 U.S. 153 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion).

28/ Nothing in Ohio's post-Furman legislation alters the fact that "[u]nder Ohio law, a death verdict may not be reduced as excessive by ... the appellate court," McGautha v. California, 402 U.S. 183, 195 (1971).

Although the Ohio Supreme Court has said that mitigating circumstance provisions must "be liberally construed in favor of the accused," State v. Bell, 48 Ohio St. 2d 270, 281 (1976), it has also held that it "will not retry issues of

offender and the circumstances of the particular offense as a constitutionally indispensable part of the processs of inflicting the penalty of death," Woodson v. North Carolina, supra, 280 U.S. at 304 (1976) (plurality opinion). This Court held in Jurek that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." 428 U.S. at 271 (plurality opinion) (emphasis added). Such consideration demands attention to "whatever mitigating circumstances" may be relevant to the individual offender or to the specific offense before extinguishing human life. Harry Roberts v. Louisiana, supra, 45 LW at 4584. Ohio has not begun to meet that constitutional requirement here.

28/ [Continued]

fact" going to sentence determination, but will only determine "whether there is sufficient substantial evidence to support the verdict rendered." State v. Edwards, 49 Ohio St. 2d. 31,47 (1976). Thus the Court has upheld a finding of an absence of duress or mental deficiency, and the resultant death sentence, in the case of a sixteen year old accomplice of an adult triggerman where "[t]here was evidence in the psychiatric reports that ... [he] was perhaps easily led by ... [the triggerman]" and evidence of "an unsatisfactory home, absence of family or other supervision, drug involvement, and an inability to cope with school demands," State v. Bell, supra, 48 Ohio St. 2d at 282.

The Ohio Supreme Court has reviewed 20 post-Furman death sentences. It has reduced none. The citations of these cases are appended hereto as Appendix B, infra.

An intermediate Ohio Appellate court has vacated the death sentences of two co-defendants after finding that the undisputed evidence established victim facilitation and inducement under Ohio Rev. Code §2929.04(B)(1). State v Hines, Ct. of Appeals, Fifth App. Dist., Case Nos. CA-634, 639 (conspicuously armed victim seeking to buy large quantity of marijuana).

B.

Death is a Disproportionately Severe and Unconstitutional Sentence for One Who Has Not Taken Life, Attempted to Take Life, or Actually Intended to Take Life.

Although the invalidity of petitioner's death sentence may be established on the basis of the inadequacy of the sentencing inquiry permitted in her case, see subsection II(A), supra, the question is also squarely raised whether the imposition of the death penalty in a case of this kind is "so disproportionate in comparison to the nature of the defendant's ... involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments." Woodson v. North Carolina, supra, 428 U.S. at 305, n.40 (plurality opinion). Since the use of the death penalty against non-triggermen in common felony-murder situations like petitioner's is demonstrably disproportionate, unjustifiable and inconsistent with contemporary standards of decency, the question is ripe for resolution by this Court.

The "objective indicia," Gregg v. Georgia, supra, 428 U.S. at 173 (plurality opinion), to which the Court must look in measuring a punishment against contemporary values establish the unconstitutionality of the execution of non-triggermen. Every American jurisdiction which has enacted guided-discretion legislation[29/] authorizing use of the death penalty

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29/ For purpose of this analysis, the term guided-discretion legislation is used to describe that which follows roughly the ALI Model, see note 15, supra.

in felony-murder cases has either precluded execution of one whose participation in the offense was relatively minor,[30] specified that a defendant's relatively minor participation be considered and weighed as a mitigating circumstance,[31] or left the capital sentencing authority free to grant mercy on the basis of any mitigating factor.[32] And, although we have no reliable documentation of the post-Furman responses of jurors to whom legislatures have entrusted discretion to express the conscience of the community in non-triggermen cases, the history of use of the death penalty in the recent past confirms without question that the combined effect of the exercise of jury discretion and the discretion of executive and prosecuting officials -- who are, of course, responsive to and empowered by the people -- has been de facto abolition of the death penalty for non-triggermen. A search of appellate opinions reported in the cases of all 90 persons executed since 1960 who appealed their convictions reveals no case in which the executed person clearly did not participate in the homicidal assault.[33]

30/ Colo. Rev. Stat. 1973 §16-11-103(5)(d) (1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-46a(f)(4) (1976 cum. pocket part); 49 U.S.C.A. §1473(6)(D) (1976).

31/ Code of Ala. Recompiled, tit. 15, §342(9)(d) (1975 interim supp.); Ariz. Rev. Stat. §13-454(F)(3) (1973 supp. pamphlet); Ark. Code §41-1304(5) (1975 supp.); Fla. Stat. Ann. §921.141(6)(d) (1976 cum. pocket part); Burns Ind. Stat. Ann. §35-50-2-9(c)(4) (1977 amendment); Vernon's Mo. Stat. Ann. §559.009.5.3(4) (1977 amendment); Nebr. Rev. Stat. §29-2523(2)(e) (19750; N.C. Gen. Stat. §15A-2000(f)(4) (1977 amendment); S.C. Code §16-52(C)(6)(4) (1977 amendment); Utah Code Ann. §76-3-207)(1)(f) (1975 cum. supp.); Wash. Rev. Code Ann. §9A.32.045(2)(d) (1977 amendment); Wyo. Stat. §6-54.2(j)(iv) (1977 revision).

32/ See note 25, supra.

33/ The citations of all 90 cases are appended hereto as Appendix C, infra.

The behavior of juries and public officials in non-triggerman cases is also indicative that there does not exist with regard to these cases such "moral outrage," Gregg v. Georgia, supra, 428 U.S. at 183 (plurality opinion), that "the only adequate response may be the penalty of death," id. at 184. And, whatever assumptions might be made regarding the deterrent effect of the death penalty for "carefully contemplated murders," id. at 186, or in categories of cases for which "other sanctions may not be adequate," ibid., common sense judgment is in accord with the overwhelming statistical evidence that the use of the death penalty against a non-triggerman who does not commit, attempt or intend a killing will not reduce the incidence of murder.[34/] This Court is therefore confronted with the question whether the execution of petitioner and of similarly situated murderers-by-legal-fiction would "be so totally without penological justification that it results in the gratuitous infliction of suffering," id. at 183.

Finally, quite apart from "public perceptions," id. at 173, of the appropriateness of the execution of non-triggermen, and quite apart from evaluations of the social effect of such executions, the killing by the State of one who has not killed, attempted to kill or intended to kill is so "grossly

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34/ For an updated, comprehensive review of that evidence, see Zeisel, The Deterrent Effect of the Death Penalty: Facts v. Faiths, THE SUPREME COURT REVIEW 317 (1976).

out of proportion to the severity of the crime," ibid., that it cannot "accord with 'the dignity of man,' which is the basic concept underying the Eighth Amendment,'" ibid. This thesis is established by the simple fact that crimes such as rape, attempted murder or assault with intent to kill, which are decidedly more serious in that they involve direct, deliberate, and (in the latter two cases) life-threatening invasions of the physical integrity of another human being, almost universally result in punishments that are not remotely comparable to the punishment of death.

C.

The Ohio Death Penalty Statutes Violate the Sixth, Eighth and Fourteenth Amendments in that They Deny the Capitally Accused the Right to a Judgment of his Peers as to the Existence of Mitigating Circumstances, and the Appropriateness of the Penalty of Death.

In Ohio, the sentencing hearing at which the decision is made to execute a capital defendant or to spare his life is conducted before the trial court alone. Ohio Rev. Code Ann. §2929.03(C)-(E) (Page 1975). The jury, once having found the defendant guilty of aggravated murder and one or more specifications, has absolutely no input into the determination as to whether the mitigating circumstances which preclude imposition of the death penalty in Ohio are present. The trial court alone hears the evidence as to mitigation, and the trial court alone decides whether the defendant will live or die.

The constitutionality of death sentencing procedures which totally exclude the jury from life-or-death decision making is now before the Court in Petitions for Writs of

Certiorari from two other States, McKenzie v. Montana (No. 76-6714) and Jordan v. Arizona (No. 76-6965). To avoid burdening the Court with repetitious matter, we incorporate by reference Subpart (I)(B) of the Reasons for Granting the Writ in McKenzie, set forth at pages 29-36 of that petition, which underscores the importance of this issue and the urgent need for its consideration by the Court. The referenced pages are attached to this petition as Appendix D.

We would only add to the argument set forth in McKenzie a short but significant item of Ohio legislative history. In Ohio, the shift to jury discretion in capital sentencing came in 1898,[35/] and the system prevailed without interruption until the death penalty statutes of that State were invalidated in 1972. There is no doubt that the subsequent determination to strip the jury of its control over the use of the death penalty reflected the desire of the Ohio Legislature to "retain the death penalty in a form consistent with the [federal] Constitution"[36/] rather than a willing abandonment of the principle that the momentous decision to take or spare the life of criminal defendant should be made only by a jury of his peers. For the new Ohio Criminal Code as drafted before the decision of this Court in Furman v. Georgia,

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35/ BOWERS, EXECUTIONS IN AMERICA 8 (1974).

36/ Woodson v. North Carolina, supra, 428 U.S. at 298 (plurality opinion)..

plainly provided for jury sentencing in capital cases.[37] But, faced with the Furman ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited, and the opinion expressed in McGautha v. California, 402 U.S. 183 (1971), that the formulation of standards to guide juries in the capital sentencing process was impossible, the Ohio legislature undoubtedly assumed that it was constitutionally necessary to make capital sentencing a matter solely for judicial determination.[38] That assumption has, of course, since proved to be false.

D.

Ohio Capital Sentencing Procedures Impermissibly Penalize Exercise of the Rights to Plead Not Guilty and to Have a Jury Trial

Under Ohio law, if a defendant pleads not guilty to an indictment charging aggravated murder with a specification of aggravating circumstances, "[t]he trier of fact may be either a jury or, if waived, a three-judge panel; . . . If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge [in a jury-tried case] or the three-judge panel [in a jury-waived case] to determine whether mitigating circumstances exist which preclude imposition of the death penalty. . . . The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three possible mitigating factors has been

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37/ Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV. ST. L. REV. 8, 16-17 (1974).

38/ Id. at 20.

established to exist by a preponderance of the evidence." State v. Bayless, supra, 48 Ohio St.2d at 81-83. As we have seen in subsection II(A), supra, the only outlet from the death penalty for a capital defendant convicted of aggravated murder upon a plea of not guilty is either (1) a failure of the jury (or three-judge panel) to find factually the existence of a statutory aggravating circumstance, or (2) the finding by the court (or three-judge panel) of one or more of Ohio's three extremely narrow mitigating circumstances. If any aggravating circumstance and no mitigating circumstance is found, the death penalty must be imposed. Ohio Rev. Code Ann. §2929.03(C), (E) (Page 1975). Thus in petitioner's case the trial judge, failing to find any legally permissible mitigating circumstance, recognized that

> "the Court has no alternative, whether the Court likes the law or not, the Court has to enforce the law as he sees it and he interprets it, and the Court will do so [by sentencing the petitioner to death]."

R. II 251.

Had petitioner pleaded guilty, however the court would have had "an alternative." It would not have been restricted by Ohio's rigid aggravating-mitigating circumstances scheme, but could have imposed a life sentence for any reason that it thought fitting, "in the interests of justice." Ohio Rule Crim. Pro. 11(C)(4) provides in relevant part:

> "If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications [of aggravating circumstances] and impose sentence [of life imprisonment] accordingly."

Moreover, had petitioner elected to waive trial by jury of the issue of guilt or innocence, she could have been sentenced to death only if a "panel of three judges unanimously [found] ... that none of the [statutory] mitigating circumstances ... is established by a preponderance of the evidence." Ohio Rev. Code Ann. §2929.03(E) (Page 1975). The benefit of trial of the mitigating-circumstances issue by a multi-judge panel which cannot impose a death sentence in the absence of unanimity is obviously considerable:

> "A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities."

Rainsburger v. Fogliane, 380 F.2d 783, 785 (CA 9 1967).

In United States v. Jackson, 390 U.S. 570 (1968), this Court held that the rights to plead not guilty and to have a jury trial are unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which these rights are waived. See also Funicello v. New Jersey, 403 U.S. 948 (1971) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). Such a scheme "needlessly encourages" the waiver of the rights to have one's guilt determined by a trial and by a jury. United States v. Jackson, supra, 390 U.S at 583. Ohio's statutes and rules of court governing the trial of capital cases provide a similarly needless and effective encouragement of waiver of federal Fifth and Sixth Amendment rights; and their constitutionality under Jackson therefore plainly warrants review on certiorari.

E.

Ohio Capital Sentencing Procedures Impermissibly Shift to the Defendant Convicted of Aggravated Murder with Specifications the Burden of Proving Facts Which Distinguish Those Who May Live from Those Who Must Die.

We have discussed in Section II(A)-(D), supra, the nature of the inquiry conducted at the mitigation phase of an Ohio capital trial. This is a proceeding at which three specific factual determinations are made, relating to the mental capacity of the defendant and two narrow features of his offense. On the basis of these factual determinations, convicted defendants are assigned to imprisonment or condemned to die at the hand of the State. Yet upon these three factual determinations, framed in the form of mitigating circumstances, Ohio law requires the defendant to bear the burden of proof by a preponderance of the evidence. Ohio Rev. Code §2929.04(B) (Page 1975); State v. Royster, supra, 48 Ohio St.2d at 389.

The question raised by this allocation of the burden of proof is also presented, and its importance is underscored, by the pending Petition for Writ of Certiorari in Jordan v Arizona, No. 76-6965. In order to spare the Court the burden of repetitious matter, we incorporate by reference Subpart II(C) of the Reasons for Granting the Writ set forth at pp. 28-30 of that petition, which are appended hereto as Appendix E, infra.

The Petition for Writ of Certiorari in Jordan v Arizona, supra, was filed without the benefit of this Court's recent decision in Patterson v. New York, ____ U.S. ____, 45 U.S.L.W. 4708 (June 17, 1977). However, we do not believe that Patterson significantly affects the analysis of the

Jordan petition since, as demonstrated in Jordan, requiring a State to prove the non-existence of the small and finite number of mitigating circumstances present herein, in the limited number of mitigation hearings held each year in capital cases, would not be "... too cumbersome, too expensive and too inaccurate." Patterson v. New York, supra, 45 U.S.L.W. at 4711.

CONCLUSION

In view of the gravity of the sentence, and in view of the need of courts and legislatures across the nation to know more precisely what the Eighth Amendment requires of the procedure employed by the State to select persons for the unique and irreversible penalty of death, it is manifestly appropriate for this Court to consider the rigidity of the Ohio capital sentencing process, its isolation from the conscience of the community,[39/] its chilling effect upon the rights to plead not guilty and to trial by jury, its allocation to the defendant of the burden of proving life-or-death facts, and the combined prejudicial effect of these factors upon a defendant who -- like this petitioner -- has not herself engaged in the deliberate taking of human life, cf. Gregg v. Georgia, supra, 428 U.S. at 187 (plurality opinion).

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INSUFFICIENTLY EXAMINED EXCLUSION FOR CAUSE OF PROSPECTIVE JURORS WITH CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT

We have seen in the preceding subparts that Ohio law no longer confers overt discretion upon the jury to determine whether a capital defendant shall live or die. The jury decides only

39/ Cf. Woodson v. North Carolina, supra, 428 U.S. at 295 (plurality opinion).

whether aggravated murder[40] and one or more aggravating circumstances[41] are established; sentencing then devolves upon the court. Under these procedures, it is arguable that death-qualification of jurors is neither necessary nor appropriate,[42] but the Ohio Supreme Court has concluded otherwise.[43] It has chosen not only to death-qualify jurors in capital, cases,[44] but to do so under standards that fall far short of the requirements of Witherspoon v. Illinois, 391 U.S. 510 (1968), and e.g., Wigglesworth v. Ohio, 403 U.S. 947 (1971).[45]

The Ohio Supreme Court has thus decided that the jury's function in capital cases implicates a juror's attitudes toward the death penalty sufficiently to warrant death-qualification, but insufficiently to warrant Witherspoon's constitutional limitations upon the practice. Petitioner's jury was death-qualified upon this principle (see pp. 18-22 supra); and its propriety plainly merits review on certiorari.

40/ Ohio Rev. Code Ann. Sec. 2903.01 (Page 1975).

41/ Ohio Rev. Code Ann. Sec. 2909.04 (A)(1) through (7) (Page 1975).

42/ Ohio Rev. Code Ann. Sec. 2929.03(B), (C) (Page 1975).

43/ If unnecessary, it is obviously inappropriate since, as the Ohio Supreme Court itself has recognized, "[a]ny exclusion of a class of jurors necessarily impinges upon the function of the jury to represent a cross section of the community." State v. Bayless, supra, 48 Ohio St.2d at 90.

44/ State v. Bayless, supra, 48 Ohio St. 2d at 89.

45/ State v. Bayless, supra, 48 Ohio St 2d at 91-92.

Under Witherspoon, veniremen may not be excluded for cause unless they make it "unmistakably clear...that their attitude toward the death penalty would prevent them from making an impartial decision" as to guilt or innocence. Witherspoon v. Illinois, supra, 391 U.S. at 522, n.21. The jury selection in petitioner's case obviously did not meet that test, but instead was conducted with only expediency in mind. See Bernette v. Illinois, 258 N.E.2d 793 (1970), rev'd 403 U.S. 947 (1971). Without explanation or sufficient inquiry, prospective veniremen were asked a single question couched in terms of whether they would be willing "to take an oath"[46/] or affirmation as a juror, knowing a possibility existed in regard to capital punishment. R. I 24-28. This inquiry failed to go far enough to justify a constitutional challenge for cause.[47/] General questions about reservations or scruples are far from the kind of examination which separates those who could not render a fair and

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46/ The full oath was not read to the veniremen. They were told only that it was "an oath to well and truly try this case" and that one must "take an oath and follow the law." R. I 24.

47/ For example, Minnie Lee stated, "If I took it [the oath] I'd follow it, but I wouldn't want to take it, not with capital punishment.

> COURT: I still have to ask you directly, Minnie, would you take an oath, now that you know the situation?
>
> MRS. LEE: No."

She was thereupon excused for cause. R. I 28.

impartial verdict from those who could. Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970).[48/]

The rationale of Witherspoon will not support the construction that the constitutional requirements announced in that case are "at best...dictum as applied to a statutory scheme, such as Ohio's, which does not permit the jury to consider sentencing." State v. Bayless, supra, 48 Ohio St.2d at 91-2. To the contrary, Witherspoon is premised on the view that an accused person is guaranteed the right to a fair trial, with a fair cross-section of the community on the jury panel. To exclude veniremen who are opposed to capital punishment but who could nonetheless fairly hear and determine the issues presented for their consideration would significantly impair that right. If the constitutional right to trial by a jury representing a cross-section of the community is to be preserved, no juror may be excused for cause unless and until it is made unambiguously clear that he could not be fair and impartial in the determinations he is asked to make.

48/ Although the limited inquiry conducted of the veniremen in this case hardly made their views "unmistakably clear," a majority of the Ohio Supreme Court was of the view that the jury selection did not violate Witherspoon. State v. Lockett, supra, 49 Ohio St. 2d at 56.

Compare, State v. Anderson, 30 Ohio St. 2d 66 (1972), in which the trial judge told prospective jurors to answer "I can" or "I cannot" regarding the verdict of guilty without recommendation of mercy. One venireman answered, "I really don't know. It's very improbable that I could recommend the death penatly." The judge asked for a definite statement and the juror indicated "I cannot." The Ohio Supreme Court reversed the verdict of death, stating that this expedient method of jury selection had a chilling effect on the imperative search for an informed and impartial jury.

Concededly, jurors in Ohio do not have an explicit sentencing role. However, the very predicate upon which the Ohio Supreme Court has authorized death-qualification of the jury is that a juror's attitudes regarding capital punishment may affect his decision on the facts relating to such issues as aggravating circumstances, which trigger the ultimate life-or-death decision. In view of the range of narrow mitigating circumstances in Ohio (see subpart II(A) supra), the decision on aggravating circumstances is usually a decision as to the ultimate penalty as well. In short, the precise theory on which the Ohio Supreme Court has allowed the prosecution to death-qualify a jury under the present statute is the theory which requires that voir dire examination comply with Witherspoon standards:

> "...the attitude toward capital punishment held by many individuals, both opposed and in favor, presents real and serious problems for the impaneling of a fair and impartial jury. Despite the fact that capital case jurors are to consider only guilt, and that sentencing is left to the trial judge, we see in the record of this voir dire that a prospective juror's opinion on capital punishment often does prevent him from impartially applying the law, as it is given in the court's instructions to the facts as he finds them." State v. Bayless, supra, 48 Ohio St.2d at 89.

The Ohio Supreme Court has found death-qualification necessary to its capital sentencing scheme, in order to obtain a fair and impartial jury. If that be so, and if death-qualification is therefore to be allowed at all, it surely cannot escape the constitutional restrictions of Witherspoon and its progeny.

IV . THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO SUPREME COURT, BY GIVING RETROACTIVE APPLICATION TO A NEW CONSTRUCTION OF OHIO REVISED CODE SECTION 2923.03(A) GOVERNING COMPLICITY, DENIED PETITIONER'S RIGHT TO FAIR WARNING OF A CRIMINAL PROHIBITION AND THEREBY DEPRIVED HER OF HER LIFE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

On January 1, 1974, a new criminal code, House Bill 511, became effective on Ohio. Prior to that time, an aider and abettor in Ohio could be prosecuted and punished as if he were the principal offender, whether or not he possessed the same mens rea as the principal offender. House Bill 511 changed Ohio law by requiring that an aider or abettor possess the same culpability as the principal. Yet in petitioner's case the Ohio Supreme Court, by a 4-3 margin, "interpreted" the new provision out of existence. Since the conduct for which petitioner was prosecuted and sentenced to die occurred after House Bill 511 took effect but before the Ohio Supreme Court's unforeseen construction of that statute, petitioner was denied fair notice of the criminal prohibition under which she stands condemned.

Prior to January 1, 1974, former Ohio Rev. Ann. Code Sec. 1.17 provided as follows:

> "Any person who aids, abets or procures another to commit an offense may be prosecuted and punished as if he were the principal offender."

This statute made no mention of the mens rea of an aider and abettor; and several pre-1974 decisions of the Ohio Supreme Court had held that an aider and abettor need not have the mens rea of the substantive offender. Stephens v.

State, 42 Ohio St. 150 (1884); Goins v. State, 46 Ohio St. 457 (1889); Woolweaver v. State, 50 Ohio St. 277 (1893); State v. Doty, 94 Ohio St. 258 (1916).

However, on January 1, 1974, Ohio Rev. Code Ann. Sec. 2932.03(A), a provision of House Bill 511, took effect. This statute provided that:

> "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> * * *
>
> (2) Aid or abet another in committing the offense." (Emphasis added)

As the dissenters below noted, this statute "... has no effective meaning if the present law is held in part to require no proof of culpability." State v. Lockett, supra, 49 Ohio St.2d at 69 (dissenting opinion). Yet that is precisely what the Ohio Supreme Court held in this case. The majority below, by citation to cases decided long before the 1974 criminal code (see State v. Lockett, supra, 49 Ohio St.2d at 60-62), in effect eviscerated the new provision entirely.[49/]

49/ The majority below also relied upon a Legislative Service Commission comment which stated generally that the new statute codified the existing law with respect to aiding and abetting. Id. at 60. However, as the dissent points out, "[t]his general statement cannot . . . control over the specific language of the statutes actually adopted." Id. at 70 (dissenting opinion). The dissent further noted that the majority's disregard of explicit statutory language limiting criminal liability was particularly surprising in the light of Ohio Rev. Code Ann. Sec. 2901.04(A), which requires that "Sections of the Revised Code defining offenses shall be strictly construed against the state, and liberally construed in favor of the accused." Ibid.

Close scrutiny of the legislative history reveals that in fact the Ohio Legislative Service Commission specifically

The Ohio Supreme Court's surprising interpretation of section 2923.03(A) was crucial to the affirmance of petitioner's conviction, since obviously her culpability was not the same as that of the principal in the Cohen's killing, Al Parker. Petitioner never entered Mr. Cohen's store, and was outside in the car during the entire incident. Parker, the State's main witness against petitioner, did not purport to connect her with any design to kill Mr. Cohen or any other person. To the contrary, Parker testified that there was no such design -- that the shooting occurred unintentionally as the result of Mr. Cohen grabbing the gun. See State v. Lockett, supra, 49 Ohio St. 2d at 67-68 (dissenting opinion). Yet petitioner now stands convicted and sentenced to die as if she had entered the store and purposely shot Mr. Cohen herself.[50/]

49/ [Continued]

recommended that a complicity section require individual proof of whether each co-defendant shared the same intent as the principal offender. The Commission staff disapproved prior case law holding that "those engaged in a common enterprise are each responsible for the acts of the other in pursuance of a common enterprise." Complicity: Accountability for Conduct of Another Person, Memorandum from Legislative Service Commission Staff to Criminal Law Technical Committee, November 14, 1966, p. 10. The Legislative Service Commission recommendation of individual culpability for complicity was adopted in the final report to the Ohio Legislature, see Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, March, 1971, p. 246. The present complicity section, §2923.03(A)(2) (Page 1975), was enacted verbatim from the Proposed Ohio Criminal Code, supra

50/ It should be noted that Ohio does not adhere to the strict felony murder rule, but rather requires an intent or purpose to kill as an essential element of first degree murder. See State v. Lockett, supra, 49 Ohio St.2d at 58-59. Petitioner's participation in the robbery of the pawnshop, without more, therefore cannot support her conviction of aggravated murder.

This expansive and unforeseeable judicial construction of Ohio's new complicity law, when applied retroactively to petitioner's case, deprived her of her right to fair warning of a criminal prohibition. E.g., Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). As this Court stated in Bouie:

> "If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in Lanzetta, or to 'guess at [the statute's] meaning and differ as to its application' as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." Ibid.

In petitioner's case, of course, we are concerned not only with petitioner's conduct at the time of the offense charged, but also with her conduct at trial in twice rejecting offers of a non-capital disposition and sentence in return for a guilty plea. See p. 12, supra. Cf. Raley v. Ohio, 360 U.S. 423 (1959). The applicability of Bouie and the fair notice doctrine in this context is perhaps best summarized in a recent comment by Professor Charles Black of the Yale Law School:

> "Now you may say that, after all, this woman knew she was guilty, and ought to have pled. I find death by electric shock a pretty stiff penalty even for such recalcitrance. But in truth the case is a

> perfect one of illustrating the fallacy of this whole line of argument. She knew she was guilty -- of what? Two out of three psychiatrists who examined her put her intelligence below dead average, and one of these put her 'in the range of borderline mental retardation.' The third doctor rated her intelligence as 'slightly above average.' She was hooked on methadone at least; whether she was in withdrawal when these decisions on pleading were made does not appear. Could she have gotten into the Tulane Law School? Yet I think that is where she would have to be even to start trying to understand the theories on which she was held guilty of killing. My trembling guess is that she may have thought something like, 'Killing? Why I was in the car.' If that was what she was thinking, three of the seven judges in Ohio's highest court thought she was right, and was therefore not guilty on either of the pleas offered her -- though they put their views in somewhat more artful terms. Are you really willing to keep running a system that electrocutes a woman like this because, with whatever feeble intellection, she made a guess as to her own guilt that was the same as the holding of three out of seven of Ohio's top judges?" Black, The Death Penalty Now, 51 Tulane L. Rev. 429, 435-36 (1977)(forthcoming).

Doubtless, the Ohio Supreme Court is free to construe its state law as it sees fit -- for the future. However, to apply the anomalous construction reached in petitioner's case retroactively without warning, is to deprive her of her life in violation of fundamental fairness. This Court should grant certiorari to consider whether any such proceeding can be squared with the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

MAX KRAVITZ
793 Pleasant Ridge
Bexley, Ohio 43209

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
PEGGY C. DAVIS
DAVID E. KENDALL
10 Columbus Circle
Suite 2030
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONER

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